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No. 04-98

Supreme Court, U.S.
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In The Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,

Petitioner,

vs.

PACIFICORP (Including UTAH POWER & LIGHT COMPANY, a division),

Respondent,

and

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, Attorney General,

Respondent/Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT/INTERVENOR STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does Idaho's amended Electric Supplier Stabilization Act (ESSA),[1] provide state action immunity from federal antitrust liability for ESSA-regulated conduct undertaken after December 8, 2000, the date ESSA's amendments first became effective?

2. Because it was not raised before the Ninth Circuit, should this Court consider Petitioner's argument that ESSA, as amended, conflicts with the Commerce Clause of the United States Constitution?

3. Does ESSA's regulation of the local, retail sale of electricity conflict with the dormant Commerce Clause of the United States Constitution?

[1] ESSA, as amended, is codified at Idaho Code §§ 61-332 through 61-334C. It is reproduced in the Respondent/Intervenor State of Idaho's Appendix A.

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RESPONDENT/INTERVENOR STATE OF IDAHO'S STATEMENT OF THE CASE

The State of Idaho heavily regulates the retail electric power industry. This regulatory scheme has resulted in "customers of Idaho's [investor-owned] electric utilities, on the average, currently pay[ing] some of the lowest electric rates in the nation." *See In re Changes Occurring in Elec. Indus.*, 172 P.U.R. 4th 11 (Idaho PUC 1996).

As part of the regulation of the electric industry, the Idaho Legislature, in 1970, passed the Electric Supplier Stabilization Act (ESSA). The purpose of ESSA is:

> [T]o promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the 'pirating' of customers of another electric supplier, discourage duplication of electric facilities, actively supervise certain conduct of electric suppliers as it relates to this act, and stabilize the territories and customers served with electricity by such suppliers.

Idaho Code § 61-332.

To accomplish these objectives, the Idaho Legislature adopted Idaho Code § 61-332B, which prohibits "electric suppliers"[2] from providing "electric service"[3] to consumers who are then or have at any time previously been connected for electric services to facilities of another electric supplier, except as permitted by order of the Idaho Public

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[2] Idaho Code § 61-332A(4) defines an "electric supplier" as "any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer."

[3] Idaho Code § 61-332A(5) defines "electric service" as "electricity furnished to an ultimate consumer by an electric supplier."

Utilities Commission (Idaho PUC), pursuant to the provisions and policies of ESSA. Idaho Code § 61-334B.

Snake River Valley Electric Association (Snake River) is a nonprofit cooperative organized to buy electric power at wholesale rates for resale to its members. In 1996 Snake River filed a federal antitrust complaint against PacifiCorp. The Ninth Circuit summarized the reason for Snake River's lawsuit as follows:

> SRVEA [Snake River] seeks to provide electricity to its members at a lower cost. As SRVEA owns no electric transmission facilities, it sought access to PacifiCorp's facilities to wheel power to its members as well as PacifiCorp's permission to serve PacifiCorp customers. PacifiCorp refused to grant consent, however, believing the ESSA authorized such refusal. As a result, SRVEA brought this antitrust action in the Idaho federal district court.

Snake River Valley Electric Association v. PacifiCorp, 238 F.3d 1189, 1191 (9th Cir. 2001) (*Snake River I*)

Relying upon ESSA, PacifiCorp moved, in part, to dismiss Snake River's complaint pursuant to the "state action doctrine," as first set forth in *Parker v. Brown*, 317 U.S. 341 (1943). The State of Idaho later intervened and filed its own motion for partial summary judgment, also contending that applicable portions of ESSA conferred state action immunity upon PacifiCorp. The District Court granted the State's motion. Snake River appealed, and on appeal the Ninth Circuit Court of Appeals reversed. *Snake River I*, 238 F.3d at 1195. The Ninth Circuit agreed that the State of Idaho, pursuant to ESSA, had clearly articulated and affirmatively expressed a state policy of restraining competition, one of the two elements necessary

for a finding of state action immunity. *Id.* at p. 1193. As to the second element, however, the Ninth Circuit held that the State of Idaho did not actively supervise the policies of ESSA, at least before ESSA was amended. *Id.* at p. 1195. The Ninth Circuit, however, stated in its decision: "It should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

The Idaho Legislature responded to the Ninth Circuit's invitation. On December 8, 2000, just two months after the Ninth Circuit's initial decision, the Governor convened the Idaho Legislature in an Extraordinary Session to deal exclusively with the active state supervision of ESSA and its provisions.[4] The Legislature enacted HB 1. 2000 Idaho 1st E.S. Laws, chapter 1. Declaring an emergency, *id.*, section 22, the Legislature granted HB 1 an effective date of December 8, 2000. HB 1 had a March 1, 2001 sunset date, however, *id.*, section 13, and so in its 2001 regular legislative session the Legislature enacted HB 142 with an effective date of February 28, 2001.[5] 2001 Idaho Sess. Laws, chapter 29, section 16.

The Legislature stated its intent in enacting HB 142:

> The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and

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[4] The Ninth Circuit's initial decision, reported as *Snake River Valley Electric Association v. PacifiCorp*, 228 F.3d 972 (9th Cir. 2000), was released on October 3, 2000. It was withdrawn and replaced by the court's Amended Opinion, which was released January 29, 2001.

[5] True and correct copies HB 1 and HB 142 are reproduced, respectively as Appendices B and C.

> other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal antitrust immunity upon parties in compliance with the act. The legislature finds that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.
>
> It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore finds that it is in the public interest to enact the following amendments.
>
> 2001 Idaho Sess. Laws, chapter 29, Section 2.[6]

The substantial amendments to ESSA were designed to address the Ninth Circuit's concerns with respect to Idaho's active supervision of the policies of ESSA. These amendments, discussed below, establish that, since December 8, 2000, Idaho now actively supervises the policies of ESSA and provide the grounds for affirming the Ninth Circuit's decision.

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[6] Section 1 of HB 1 reads the same as Section 2 of HB 142. 2000 Idaho 1st E.S. Laws, chapter 1, section 1.

ESSA, as amended, places significant new duties and authority upon the Idaho PUC for supervising the policies of ESSA. For example, Idaho Code § 61-332C(2) states that no electric supplier shall construct or extend facilities, nor permit any connection to be made from any of its facilities, nor supply electric service in violation of ESSA's terms, except as ordered by the Idaho PUC.

Idaho Code § 61-332D states that an electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction. Section 61-332D goes on to require an electric supplier declining to furnish wheeling service pursuant to this section to petition the Idaho PUC for review of the electric supplier's action with respect to a request for such service. The Idaho PUC is, in turn, required to review the electric supplier's action for consistency with the purposes and provisions of ESSA, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.[7]

Idaho Code § 61-333(1) states that any electric supplier may contract with any other electric supplier for the purpose of allocating territories, consumers, and future consumers. Significantly, however, the statute goes on to state that all such contracts must be filed with the Idaho PUC, and the Idaho PUC shall approve or reject the

[7] Pursuant to Section 61-332D, PacifiCorp petitioned the Idaho PUC for review of its action to deny Snake River's request for wheeling services. Snake River removed PacifiCorp's petition to federal court. PacifiCorp moved to remand, which was granted. Subsequently, Snake River moved the Idaho PUC to dismiss PacifiCorp's petition and PacifiCorp moved for summary judgment, both motions of which the Idaho PUC denied. *Snake River Valley Electric Association v. PacifiCorp*, 357 F.3d 1042, 1049 n. 7 (9th Cir. 2004).

contracts. The Idaho PUC may only approve such contracts upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of ESSA.[8]

Idaho Code § 61-334A provides that any electric supplier or consumer whose rights under ESSA are violated or threatened with violation may file a complaint with the Idaho PUC for relief.

Idaho Code § 61-334B states that upon a petition of any consumer or electric supplier for an exception to Idaho Code § 61-332B, mentioned above, or Idaho Code §§ 61-332C(1)(a), (b), or (c), the Idaho PUC may grant the relief, but only if doing so is consistent with the purposes of ESSA, as set forth in Section 61-332. Section 61-334B(2) goes on to state that the Idaho PUC has the power to grant or deny authorizations and orders requested under ESSA, and that it may also attach conditions and terms as it determines are consistent with the purposes of ESSA. Thus, exemptions from ESSA's coverage may be granted, but only upon Idaho PUC review and approval.

The above-cited sections establish active state supervision. As the Ninth Circuit noted, "only the [Idaho] PUC can decide when a current utility can (or must) transfer customers to a new electrical supplier." *Snake River Valley*

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[8] Idaho Code § 61-333(2) states that any electric supplier "may also contract in writing with any other electric supplier for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section and any contract validly entered into and approved by the commission after notice and opportunity for hearing shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law."

Electric Association v. PacifiCorp, 357 F.3d 1042, 1050 (9th Cir. 2004) (*Snake River II*). Thus, active state supervision is met "because there is no other actor, including the public utility that is or was servicing the customers, with control over whether a new supplier can gain these customers." *Id.* (*citing 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987)) (a statute that fixed a price margin between wholesale and retail prices may amount to active state supervision without actual state supervision over each decision on prices). Moreover, in the time since the December 8, 2000 ESSA amendments have been in effect, it is clear that the State of Idaho has been actively supervising the policies of ESSA. For example, the Idaho PUC has received, invited public comment, reviewed and subsequently approved petitions from electric suppliers concerning service territories, customers, and the purchase of facilities, finding that they are in conformance with the purposes of ESSA. *See e.g. In the Matter of the Application to Approve a Customer Allocation Agreement Between Avista Utilities and Kootenai Electric Cooperative*, 2002 WL 535354 (Idaho PUC Mar. 18, 2002); *In the Matter of the Application of United Co-Op, Inc. for Approval of an Agreement Pursuant to Idaho Code § 61-333*, 2002 WL 1486352 (Idaho PUC June 7, 2002); *In re Avista Corp.*, 2003 WL 22138570 (Idaho PUC Aug. 7, 2003); and *In re United Electric Co-op*, 2003 WL 22472161 (Idaho PUC Oct. 8, 2003).

Subsequent to ESSA's amendments, the State moved for partial summary judgment on the grounds that ESSA gave state action immunity from federal antitrust liability and that PacifiCorp was immune from December 8, 2000 onward, the date ESSA's amendments became effective. The district court granted the state motion. *Snake River*

II, 357 F.3d at 1046. After a jury trial on the remaining issues, in which PacifiCorp prevailed, Snake River once again appealed. As related to the issues litigated by the State, Snake River argued that ESSA's amendments did not confer state action immunity, but if they did, then the amendments violate the Contracts Clause of the United States Constitution. The Ninth Circuit rejected Snake River's arguments, holding that ESSA's amendments, as of December 8, 2000, the date the amendments became effective, provide a shield from federal antitrust immunity. *Snake River II*, 357 F.3d at 1051. The Ninth Circuit also rejected Snake River's Contracts Clause claim. *Id.* at 1051 n. 9. The Ninth Circuit did not rule, because the issue was not raised, that Snake River's claim before this Court that ESSA did or did not conflicts with the Commerce Clause of the United States Constitution.

Applying the law to the facts of this case, it is clear that the Ninth Circuit correctly affirmed the District Court's decision to grant the State of Idaho's motion for partial summary judgment.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. The Rule emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Petitioners urge in the instant case. The Ninth Circuit's decision in this

case and its application of state-action antitrust immunity do not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort.

II. The State Action Doctrine Immunizes From Federal Antitrust Attack Anticompetitive Conduct That Is Directed By The State

Parker v. Brown, 317 U.S. 341 (1943), is the beginning point with respect to the state action doctrine. In *Parker*, this Court upheld as an "act of government which the Sherman Act did not undertake to prohibit," *id.* at 352, a California program that regulated production and marketing of raisins by the state's growers. The statute implementing the program authorized various anticompetitive practices. Although interested producers proposed and approved the marketing programs, this Court held that, "it is the state, acting through the Commission, which adopts the program and enforces it with penal sanctions, in the execution of governmental policy." *Id.* As such, according to this Court, principles of federalism immunized the anticompetitive activities from federal antitrust challenge: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress." *Id.* at 351.

To be sure, only those competitive restraints which constitute "state action or official action directed by a state," *Parker*, 317 U.S. at 351, qualify for antitrust immunity. Accordingly, this Court has established a two-part test (known as the "*Midcal* test"), for determining immunity

under *Parker*: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

A. For State Action Doctrine Immunity To Apply, The State Must Clearly Articulate As Its Policy The Anticompetitive Conduct At Issue

With respect to the first part of the test, if the applicable statutory provision or rule clearly contemplates the anticompetitive conduct which is challenged, the "clear articulation" requirement is satisfied. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42, 44 (1985). In fact, as the United States Supreme Court has stated, in order to satisfy the first part of the *Midcal* test, "[i]t is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991) (*quoting Hallie*, 471 U.S. at 42).

B. For State Action Doctrine Immunity To Apply, The State Must Also Actively Supervise The Anticompetitive Policy

With respect to the second part of the *Midcal* test, in order to find active state supervision, it must be shown that the State "'exercise[s] ultimate control over the challenged anticompetitive conduct.'" *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S.

621, 634 (1992) (*quoting Patrick v. Burget*, 486 U.S. 94, 101 (1988)). The test requires that "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.*

C. ESSA, As Amended, Satisfies The Requirements For State Action Immunity To Apply In This Case

1. The State Of Idaho Has Clearly Articulated And Affirmatively Expressed As State Policy The Activities That Snake River Challenges Under The Federal Antitrust Laws In This Case

There should be no doubt that, as a matter of law, the State of Idaho has clearly articulated and affirmatively expressed as state policy the anticompetitive conduct of which Snake River complains in this case. In the first appeal, the Ninth Court held "that ESSA clearly expresses a policy to displace competition among electrical suppliers, so that the first prong of *Midcal* is satisfied." *Snake River I*, 238 F.3d at 1193. In the second appeal, the Ninth Circuit stated,

> Because the prior version of the ESSA satisfied this prong, and the State of Idaho strengthened its articulation of policy in the amendments to ESSA, we conclude that *a fortiori* the amended ESSA satisfies the clearly articulated state policy prong. The state has made abundantly clear that it is advancing a policy that restricts competition in this regulated area.

Snake River II, 357 F.3d at 1049.

Snake River does not dispute this portion of the Ninth Circuit's ruling in its writ of certiorari. It is certainly not grounds for granting a writ of certiorari.

2. The State Of Idaho Actively Supervises Its Policy Of Restraint Of Trade As Set Forth in ESSA

Idaho's amended ESSA establishes that the State of Idaho "'exercise[s] ultimate control over the challenged anticompetitive conduct in this case.'" *Ticor*, 504 U.S. at 634 (*quoting Patrick*, 486 U.S. at 101). A review of the amended ESSA also indicates that "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.* Indeed, the amendments to ESSA remedy the very deficiencies with ESSA, which the Ninth Circuit identified as reasons for holding that Idaho did not actively supervise the policies of ESSA, prior to its amendment. The amendments put Idaho exactly under what this Court has indicated is sufficient for the establishment of active state supervision.

ESSA, as amended, now does not allow electric suppliers the right to "opt out" of competition without state review. Indeed, ESSA prohibits one electric supplier from providing electric service to the customer of another supplier. Idaho Code § 61-332B. The only exception to this rule is if the Idaho PUC, upon a petition filed with it, enters an order finding that the requested exception is consistent with the overall policies of ESSA. Idaho Code § 61-334B. Furthermore, under ESSA an electric supplier can no longer contract with any other electric supplier for purposes of allocating territories, consumers, and future consumers unless the Idaho PUC approves the contract.

Thus, the State, and only the State, determines under what circumstances competition will be allowed. It is the State that supervises the policies of ESSA, and it is the State that ensures these policies are implemented and followed. The State has done so by granting significant and broad powers to the Idaho PUC to accomplish these objectives. There is no authority or control, partial or otherwise, granted to any electric supplier to avoid complying with ESSA.

Not only do the amendments to ESSA provide for active state supervision, the fact of the matter is that the State is actively supervising ESSA's policies. As mentioned above, since ESSA's amendments became effective, the Idaho PUC has received petitions from electric suppliers seeking approval for customer and service territory agreements. The Idaho PUC reviewed and subsequently has approved these agreements, finding that they are in conformance with the purposes of ESSA.

In short, as described above, under ESSA no electric supplier can contract with any other electric supplier for purposes of allocating territories, consumers, and future consumers unless the Idaho PUC approves the contract. No electric supplier can, on its own, opt out of ESSA's coverage. Only the Idaho PUC can approve contracts relating to the allocating of territories, consumers, and future consumers. Idaho Code §§ 61-333 and 61-334B. Only the Idaho PUC can determine when competition is to be allowed. Private party discretion has been eliminated; full authority to review conduct under ESSA has been granted to the Idaho PUC and it is exercising that authority.

The amendments fully and completely address the concerns addressed by the Ninth Circuit in *Snake River I*, as held by the Ninth Circuit in *Snake River II*. These amendments make clear that the State of Idaho actively supervises the policies of ESSA, as established by the Idaho Legislature. As such, state action immunity should attach to any claim that has as its basis conduct occurring on or after the effective date of ESSA's amendments, which was December 8, 2000.

Snake River contends that because the Idaho PUC has not yet entered a final order resolving PacifiCorp's petition under Idaho Code § 61-332D (that it need not provide wheeling services to Snake River), state action immunity does not exist. *Petition for a Writ of Certiorari*, pp. 13-15. There is no precedent for the proposition that state action immunity only attaches after a State undertakes and finally resolves a specific matter entrusted to a specific governmental agency within time constraints desired by an antitrust litigant. What the precedent teaches is that if the State "exercise[s] ultimate control over the challenged anticompetitive conduct," *Ticor*, 504 U.S. at 634, active state supervision exists sufficient to satisfy the state action doctrine. Given that the Idaho Legislature amended ESSA to provide active state supervision of the very activities challenged by Snake River in this case, it cannot be gainsaid but that active state supervision exists in Idaho under ESSA, as of December 8, 2000, as held by the Ninth Circuit in *Snake River II*.

III. Snake River Did Not Raise Before The Ninth Circuit Any Argument That ESSA, As Amended, Conflicts With The Commerce Clause Of The United States Constitution

Snake River did not raise before the Ninth Circuit the issue of whether ESSA conflicts with the Commerce Clause of the United States Constitution.[9] As such, this Court should not address the issue. *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"). Even if the Court were to address the issue, however, it is clear that there are no Commerce Clause impediments to ESSA's amendments.

IV. Amended ESSA Does Not Conflict With The Dormant Commerce Clause Of The United States Constitution

Snake River cites no federal statute or federal regulation voiding or preempting ESSA. Snake River argues that ESSA, as amended, cannot confer state action immunity because Idaho is without authority, pursuant to the dormant Commerce Clause of the United States Constitution, to adjudicate the wheeling of wholesale power. Snake River misrepresents ESSA's jurisdictional reach. The State

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[9] As noted above, Snake River did raise the issue of whether ESSA, as amended, violated the Contracts Clause of the United States Constitution. The Ninth Circuit rejected that claim, *Snake River II*, 357 F.3d at 1051 n. 9, and Snake River has not raised that issue in its petition before this Court.

of Idaho has not and is not asserting that it has jurisdiction over any interstate wheeling service request by Snake River. In addition, the State is not and has not suggested that it has jurisdiction over any interstate transmission or wholesale sale of power to Snake River.

What the State of Idaho does assert, pursuant to ESSA's amended provisions, is that it has jurisdiction to address Snake River's desire for retail wheeling in Idaho. This exercise of jurisdiction over retail wheeling is not precluded by the Commerce Clause of the United States Constitution, nor by Federal Energy Regulatory Commission (FERC) order or the Federal Power Act's (FPA) provisions. Indeed, sections 212(g) and 212(h) of the FPA specifically recognize that States may regulate the provisions of electric service in their states and may prohibit retail wheeling and sham wholesale transactions. Where federal law expressly allows that which ESSA addresses, it can be persuasively argued that the dormant Commerce Clause is violated.

Section 212(g) of the FPA prohibits FERC from issuing an order "which is inconsistent with any state law which governs the retail marketing areas of electric utilities." 16 U.S.C. §824k(g) (1994). ESSA is just such a law. Idaho Code §61-332B of ESSA clearly prohibits electric suppliers, like Snake River, from furnishing electric service to any electric customer "that is then or had at any time previously been lawfully connected for electric service to facilities of another electric supplier except as provided in this act." Finally, Idaho Code § 61-333 of ESSA states that the Idaho PUC shall review all supplier contracts that allocate territories, existing consumers, or future consumers.

Section 212(h) of the FPA makes clear that FERC is specifically prohibited, in part, from issuing an order conditioned upon or requiring the transmission of electric energy "to, or for the benefit of, an entity if such electric energy would be sold by such entity to an ultimate consumer. . . ." 16 U.S.C. § 824k(h)(2).

This statute recognizes that States possess jurisdiction over local (intrastate) facilities and the sale of electricity to retail customers. Indeed, Section 212(h) of the FPA prohibits the FERC from issuing an order requiring retail wheeling, which is the transmission of electric energy directly to an ultimate consumer. 16 U.S.C. § 824k(h)(1). This section also prohibits "sham wholesale transactions."[10]

Idaho Code § 61-332D is a state statute which prohibits retail wheeling and sham wholesale transactions. Its text addresses the very conduct that the language of Section 212(h) of the FPA excludes FERC from issuing orders concerning. Thus, Section 61-332D is not preempted or otherwise obstructed by FERC or any other federal legislation.

In short, the conduct that Sections 212(g) and 212(h) of the FPA exempt from FERC's jurisdiction is exactly

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[10] FERC has described "sham wholesale wheeling" as the "transmission of electric energy to an entity for resale to an ultimate consumer in instances in which the substance of the transaction amounts to retail wheeling because the wholesale sale to the entity is in fact a subterfuge intended to circumvent the ban on retail wheeling." *City of Palm Springs*, 76 FERC ¶ 61,127, 1996 WL 586752 (FERC) (July 31, 1996) at p. 12 *quoting* 138 Cong. Rec. S17613 (daily ed. Oct. 8, 1992 (statement of Sen. Johnston)); *Prairieland Energy*, 92 FERC ¶ 61,005, 2000 WL 876882 (FERC) (July 3, 2000) (Order on Rehearing).

what Snake River argues the State of Idaho cannot actively supervise and oversee here – issues related to retail marketing areas and retail wheeling. This being so, there can be no valid argument that ESSA, as amended, conflicts with the Commerce Clause of the United States Constitution

CONCLUSION

ESSA, as amended, confers state action immunity from federal antitrust liability from December 8, 2000 onward, the date ESSA's amendments became effective. ESSA does not conflict with the Commerce Clause of the United States Constitution, and in any event this Court need not review that claim because Snake River did not raise it with the Ninth Circuit. Thus, Respondent/Intervenor State of Idaho therefore respectfully requests that the instant petition be denied.

Respectfully submitted this 20th day of September, 2004,

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APPENDIX A

TITLE 61
PUBLIC UTILITY REGULATION
CHAPTER 3
DUTIES OF PUBLIC UTILITIES

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. (1) This act includes sections 61-332 through 61-334C, Idaho Code, and shall be referred to herein as "this act" and may be cited and referred to as the "Electric Supplier Stabilization Act."

(2) This act and its amendments are designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of consumers of another electric supplier, discourage duplication of electric facilities, actively supervise certain conduct of electric suppliers as it relates to this act, and stabilize the territories and consumers served with electricity by such electric suppliers.

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to the consumers of the municipality in the state of Idaho.

(4) "Electric supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5) "Electric service" means electricity furnished to an ultimate consumer by an electric supplier.

(6) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7) "Service entrance" means the location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists, and which are intended to provide the means of cutoff of the supply.

(8) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the provisions of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9) "Transmission line," for the purposes of this act, means any electric line of an electric supplier carrying a voltage of sixty-nine (69) KV or more.

(10) "Service line," for the purposes of this act, means any single or multi-phase electric line of an electric

supplier used for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that electric supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER ELECTRIC SUPPLIER. No electric supplier shall supply or furnish electric service to any electric service entrance that is then or had at any time previously been lawfully connected for electric service to facilities of another electric supplier except as provided in this act.

61-332C. PROVISIONS FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. (1) In determining which electric supplier will provide electric service for a new service entrance, the following provisions will govern:

(a) If no electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of a new service entrance the consumer shall have the right of choice of electric supplier.

(b) If only one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance that electric supplier shall have the right to serve the consumer at the new service entrance.

(c) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the electric supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

(d) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance and it cannot be determined by proof which service line is nearest the new service entrance, then the consumer or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the board of professional engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the provisions of this section, except as ordered by the commission pursuant to this act.

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric supplier's action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. (1) Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the electric suppliers and designating which territories and consumers are to be served by which contracting electric supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting electric suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting electric supplier, or by reasonable and economic extensions thereto. All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public

utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.

(2) Any electric supplier may also contract in writing with any other electric supplier for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section and any contract validly entered into and approved by the commission after notice and opportunity for hearing shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

61-333A. INCREASED AREA – EXTENSION OF SERVICE PERMITTED. In the event an area hereafter shall be included as a result of incorporation or annexation within the boundaries of a city, town or village, any public utility and any cooperative association organized for the purpose of furnishing electric service to its members or consumers only, furnishing electric service or operating electric facilities in such area prior to such inclusion, shall, unless the municipality acquire such facilities pursuant to section 61-333B, Idaho Code, and subject to the provisions of sections 61-332B and 61-332C, Idaho Code, have the right to continue and extend the furnishing of electric services in such area, and to utilize public streets, alleys and thoroughfares, or such portion of such annexed area

as is designated on the recorded plat for the installation of utilities, for such purpose. Such public utility or cooperative association shall comply with all lawful and reasonable safety requirements and the laws of the state of Idaho and nondiscriminatory ordinances of the city, town or village, as to the manner of constructing and maintaining electrical facilities therein.

61-333B. MUNICIPAL CORPORATION RESTRICTED IN SERVING NEW AREA PREVIOUSLY SERVED BY UTILITY OR COOPERATIVE ASSOCIATION – VOLUNTARY AGREEMENTS – ELECTION – APPEALS. In the event the annexing municipality has been furnishing electric service to its residents at the time of such annexation, or thereafter commences the furnishing of such service to its residents, nothing in this chapter shall prevent such municipality from extending its service to the annexed or incorporated area, upon the payment of just compensation, as defined in section 7-711, Idaho Code, to such public utility or cooperative serving such area prior to annexation, for any property, real or personal, including damages to the remainder of the system, if any, of such cooperative or public utility, used in distribution, transmission or supply of electrical energy to such area prior to annexation. As used herein, just compensation shall include consideration of new installations necessarily made between the time of annexation or incorporation and final settlement. Provided, however, in case the annexed area was previously served by a cooperative association, no extension shall be made by the municipal corporation, except upon the following conditions:

1. Until the terms and conditions of such extension, including just compensation therefor, have been finally

determined by voluntary agreement between the annexing municipality and the servicing cooperative association, or

2. In the event that such voluntary agreement cannot be made within ninety (90) days of the date of incorporation or annexation of such territory served by such cooperative association, then the municipal corporation may, if so determined by unanimous vote of its governing body, submit to the qualified electors of such municipality upon a special ballot to be voted upon at the next regular election of such municipality, the question "Shall portions of the. . . . of. . . ., Idaho which have heretofore been served electrical energy by. . . . become a part of the electrical system of the. . . . of. . . ., Idaho. Said areas are generally known and described as follows: (Insert description)."

A majority of the votes cast on said special ballot must be in favor of the proposition in order to approve the transaction on the part of the municipal corporation. Further, the cooperative association shall submit either by mail or at an annual or special meeting to its members, at the same time of the municipal election above mentioned, the question of whether or not the board of such cooperative association be authorized to sell to the municipality upon payment of just compensation, to be agreed upon, or if agreement be not reached, upon compensation determined as provided hereinafter. A majority of the votes cast must be in favor of the proposition in order to approve the transaction on the part of the cooperative association. At least 15 days before the vote by the members of the cooperative association, the association shall submit to the municipality a list of members eligible to vote and the municipality is hereby authorized to submit to said members a written statement of the

reasons for the transfer to electric service by the municipality.

If agreement cannot be reached upon the amount of just compensation, the matter shall be submitted to the district court of the county wherein the municipality is located pursuant to procedures of title 10, chapter 12, Idaho Code, for this purpose of fixing and determining the amount of just compensation as hereinbefore defined.

The court may appoint not more than two (2) experts to advise the court, and the costs of the action, including fees of such experts, shall be taxed equally to the parties.

Either party may appeal from the decision of the court in the same manner that other appeals are taken therefrom. No transfer of facilities shall be made until the amount of compensation has been finally determined and paid.

61-333C. NONMUNICIPAL SERVICE ORGANIZATIONS PROHIBITED FROM EXTENDING SERVICE. Nothing contained herein shall authorize any cooperative association or public utility having transmission lines presently within corporate limits of any municipal corporation, presently engaged in the sale of electrical energy to its citizens, to make any service connections within corporate limits of such municipal corporation from such transmission lines.

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1) Grant the commission jurisdiction over cooperatives or municipalities except as authorized in this act.

(2) Apply to controversies between two (2) or more public utilities.

(3) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of electric suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

61-334A. REMEDIES FOR VIOLATION OF THIS ACT. (1) Any electric supplier or consumer whose rights under this act shall be violated or threatened with violation may file a complaint with the commission against an electric supplier and any other person responsible for the violation.

(2) After notice and opportunity for hearing, the commission shall make findings of fact and conclusions of law determining whether this act or any orders issued under this act have been violated or threatened to be violated and shall determine whether there is actual or threatened irreparable injury as to the electric supplier or consumer whose rights are violated or threatened with violation as a basis for granting relief.

(3) The relief to be granted under this section for violation of this act shall forbid further acts in violation of

such orders, shall order the removal of any electric connections, facilities or equipment that constitute the violation, or a combination thereof necessary to enforce compliance with this act.

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request only upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48, Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions

of this act or any commission order issued pursuant to this act.

APPENDIX B

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature First Regular Session – 2000

IN THE HOUSE OF REPRESENTATIVES
HOUSE BILL NO. 1
BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO THE ELECTRIC SUPPLIER STABILIZATION ACT; TO PROVIDE A STATEMENT OF INTENT; AMENDING SECTION 61-332, IDAHO CODE, TO CLARIFY THE PURPOSES OF THE ELECTRIC SUPPLIER STABILIZATION ACT AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332A, IDAHO CODE, TO REVISE DEFINITIONS, TO DELETE A REFERENCE TO OBSOLETE MATERIAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332B, IDAHO CODE, TO REQUIRE APPROVAL OF THE PUBLIC UTILITIES COMMISSION FOR TRANSFERRING CONSUMERS; AMENDING SECTION 61-332C, IDAHO CODE, TO PROVIDE PROVISIONS FOR SELECTING AN ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332D, IDAHO CODE, TO SUPERVISE WHEELING SERVICES; AMENDING SECTION 61-333, IDAHO CODE, TO REQUIRE ELECTRIC SERVICE TERRITORY CONTRACTS TO BE FILED WITH AND APPROVED BY THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARING REGARDING CONTRACT APPROVAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-334, IDAHO CODE, TO PROVIDE

THAT THE PUBLIC UTILITIES COMMISSION HAS CERTAIN AUTHORITY OVER ELECTRIC SUPPLIERS, TO PROVIDE FOR APPLICATION OF PUBLIC UTILITIES LAW AND TO MAKE TECHNICAL CORRECTIONS; REPEALING SECTION 61-334A, IDAHO CODE; AMENDING SECTION 61-334B, IDAHO CODE, TO REDESIGNATE THE SECTION, TO PROVIDE FOR FILING A COMPLAINT WITH THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARINGS, TO PROVIDE REMEDIES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE COMMISSION SUPERVISION AND AUTHORITY; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334C, IDAHO CODE, TO PROVIDE ELECTRIC SUPPLIER IMMUNITY; REPEALING SECTIONS 61-332, 61-332A, 61-332B, 61-332C, 61-332D, 61-333, 61-334, 61-334A, 61-334B AND 61-334C, IDAHO CODE; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332, IDAHO CODE, TO PROVIDE THE PURPOSE OF THE ELECTRIC SUPPLIER STABILIZATION ACT; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332A, IDAHO CODE, TO PROVIDE DEFINITIONS FOR THE ELECTRIC SUPPLIER STABILIZATION ACT; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332B, IDAHO CODE, TO PROVIDE THAT AN ELECTRIC SUPPLIER SHALL BE PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER SUPPLIER; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332C, IDAHO

CODE, TO PROVIDE RULES FOR SELECTING ELECTRIC SUPPLIERS FOR NEW ELECTRIC SERVICE ENTRANCES; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-333, IDAHO CODE, TO AUTHORIZE CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334, IDAHO CODE, TO PROVIDE SPECIAL RULES OF INTERPRETATION; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334A, IDAHO CODE, TO PROVIDE LEGAL RELIEF FOR AGGRIEVED ELECTRIC CONSUMERS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE LEGAL REMEDIES FOR VIOLATION OF THE ELECTRIC SUPPLIER STABILIZATION ACT; DECLARING AN EMERGENCY FOR VARIOUS SECTIONS, PROVIDING A SUNSET CLAUSE FOR ONE SECTION AND PROVIDING AN EFFECTIVE DATE FOR OTHER SECTIONS OF THIS ACT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal

antitrust immunity upon parties in compliance with the act. The legislature finds that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.

It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore finds that it is in the public interest to enact the following amendments.

SECTION 2. That Section 61-332, Idaho Code, be, and the same is hereby amended to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. ~~A.~~ **(1)** This act includes sections 61-332~~, 61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A, and~~ **through** 61-334~~B~~**C**, Idaho Code, ~~as herein enacted, section 61-333A, Idaho Code, as herein amended, and sections 61-333B and 61-333C, Idaho Code, as already enacted,~~ and shall be referred to herein as "this act" and may be cited and referred to as the "~~e~~**E**lectric ~~s~~**S**upplier ~~s~~**S**tabilization ~~a~~**A**ct."

~~B.~~ **(2)** This act ~~is~~ **and its amendments are** designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of ~~customers~~ **consumers** of another **electric** supplier, discourage duplication of electric facilities, **actively supervise certain conduct of electric suppliers as it relates to this act,** and stabilize the territories

and ~~*customers*~~ **consumers** served with electricity by such **electric** suppliers.

SECTION 3. That Section 61-332A, Idaho Code, be, and the same is hereby amended to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1.) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2.) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3.) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to ~~*its citizens*~~ **the consumers of the municipality** in the state of Idaho.

(4.) "**Electric s**~~S~~upplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5.) "Electric service" means electricity furnished to an ultimate consumer by a**n electric** supplier.

(6.) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7.) "Service entrance" means the ~~*entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment*~~

~~*or utilization equipment" as defined in the national electrical code of 1965*~~ **location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists, and which are intended to provide the means of cutoff of the supply**.

(8.) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the ~~*rules*~~ **provisions** of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9.) "Transmission line," **for the purposes of this act,** means any electric line of a**n electric** supplier ~~*for*~~ carrying a voltage of sixty-nine (69) KV or more.

(10.) "Service line," **for the purposes of this act,** means any **single or multi-phase** electric line of a**n electric** supplier **used** for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11.) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that **electric** supplier under this act. It

shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

SECTION 4. That Section 61-332B, Idaho Code, be, and the same is hereby amended to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER **ELECTRIC** SUPPLIER. No electric supplier shall ~~*construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service nor shall it*~~ supply or furnish electric service to any electric service entrance that is then or had at any time previously been **lawfully** connected for electric service to facilities of another electric supplier ~~*without the written consent of such other electric supplier; provided, however, (a) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance, and (b) such other electric supplier is willing and able to provide adequate electric service*~~ **except as provided in this act**.

SECTION 5. That Section 61-332C, Idaho Code, be, and the same is hereby amended to read as follows:

61-332C. ~~*RULES*~~ **PROVISIONS** FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. **(1)** In ~~*the event more than one electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall*~~ **determining which electric supplier will provide electric service for a new**

service entrance, the following provisions will govern:

~~1.~~**(a)** If no electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of ~~the~~ **a** new service entrance the consumer shall have the right of choice of **electric** supplier.

~~2.~~**(b)** If only one (1) electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance that **electric** supplier shall have the right to serve the consumer at the new service entrance.

~~3.~~**(c)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance the **electric** supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

~~4.~~**(d)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance ~~and the existing service lines are equidistant from the service entrance, or~~ **and** it cannot be determined by proof which service line is nearest the new service entrance, then the consumer ~~shall have the right of choice of supplier~~ **or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.**

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the

board of professional engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the ~~*rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations*~~ **provisions of this section, except as ordered by the commission pursuant to this act**.

SECTION 6. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332D, Idaho Code, and to read as follows:

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric supplier's action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

SECTION 7. That Section 61-333, Idaho Code, be, and the same is hereby amended to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. ~~A.~~ **(1)** Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the **electric** suppliers and designating which territories and consumers are to be served by which contracting **electric** supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting **electric** suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting **electric** supplier, or by reasonable and economic extensions thereto. **All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.**

~~B.~~ **(2)** Any electric supplier may also contract in writing with any other electric supplier for the sale,

exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection ~~*A hereof. C. Any*~~ **(1) of this section and any** contract validly entered ~~*pursuant to this section*~~ **into and approved by the commission after notice and opportunity for hearing** shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 8. That Section 61-334, Idaho Code, be, and the same is hereby amended to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1.) Grant ~~*Idaho public utilities*~~ **the** commission jurisdiction over cooperatives or municipalities **except as authorized in this act**.

(2.) Apply to controversies between two (2) or more public utilities.

(3.) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of **electric** suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

SECTION 9. That Section 61-334A, Idaho Code, be, and the same is hereby repealed.

SECTION 10. That Section 61-334B, Idaho Code, be, and the same is hereby amended to read as follows:

61-334~~B~~**BA**. ~~*LEGAL*~~ REMEDIES FOR VIOLATION OF THIS ACT. ~~*A.*~~**(1)** Any electric supplier **or consumer** whose rights under this act shall be violated or threatened with violation~~*, shall be entitled to injunctive relief against said violation upon proper*~~ **may file a** complaint ~~*and proof in accordance with Idaho rules of civil procedure in district court, against the other*~~ **with the commission against an** electric supplier and any other person responsible for the violation.

~~*B.*~~**(2)** ~~*In any suit for injunctive relief*~~ **After notice and opportunity for hearing, the commission shall make** findings **of fact** and conclusions ~~*by the court that any rules under*~~ **of law determining whether** this act **or any orders issued under this act** have been violated or threatened to be violated **and** shall ~~*require findings and conclusions by the court of*~~ **determine whether there is** actual or threatened irreparable injury as to the electric supplier **or consumer** whose rights are violated or threatened with violation as a basis for ~~*equitable relief hereunder*~~ **granting relief**.

~~*C.*~~**(3)** The ~~*injunctive*~~ relief to be granted under this section for violation of this act shall ~~*be negative in form, enjoining*~~ **forbid** further acts in violation of such ~~*rules*~~ **orders**, shall ~~*be affirmative in form in requiring*~~ **order the** removal of any electric connections, facilities or equipment that constitute the violation~~*, and shall be*~~ **or** a combination thereof necessary to enforce compliance with this act.

~~*D. Any aggrieved party may also pursue any other remedy provided by law.*~~

SECTION 11. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request only upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

SECTION 12. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334C, Idaho Code, and to read as follows:

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48,

Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions of this act or any commission order issued pursuant to this act.

SECTION 13. That Sections 61-332, 61-332A, 61-332B, 61-332C, 61-332D, 61-333, 61-334, 61-334A, 61-334B and 61-334C, Idaho Code, be, and the same are hereby repealed.

SECTION 14. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332, Idaho Code, and to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. (1) This act includes sections 61-332, 61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A and 61-334B, Idaho Code, as herein enacted, and sections 61-333A, 61-333B and 61-333C, Idaho Code, as already enacted, and shall be referred to herein as "this act" and may be cited and referred to as the "Electric Supplier Stabilization Act."

(2) This act is designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of customers of another supplier, discourage duplication of electric facilities, and stabilize the territories and customers served with electricity by such suppliers.

SECTION 15. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332A, Idaho Code, and to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(2) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3) "Electric service" means electricity furnished to an ultimate consumer by a supplier.

(4) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(5) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to its citizens in the state of Idaho.

(6) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the rules of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization

equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(7) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(8) "Service entrance" means the entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment or utilization equipment" as defined in the national electrical code of 1965.

(9) "Service line" means any electric line of a supplier for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(10) "Supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(11) "Transmission line" means any electric line of a supplier for carrying a voltage of sixty-nine (69) KV or more.

SECTION 16. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332B, Idaho Code, and to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER SUPPLIER. No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service

nor shall it supply or furnish electric service to any electric service entrance that is then or had at any time previously been connected for electric service to facilities of another electric supplier, without the written consent of such other electric supplier; provided however: (1) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance; and (2) such other electric supplier is willing and able to provide adequate electric service.

SECTION 17. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332C, Idaho Code, and to read as follows:

61-332C. RULES FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. In the event more than one (1) electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall govern:

(1) If no electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the consumer shall have the right of choice of supplier.

(2) If only one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance that supplier shall have the right to serve the consumer at the new service entrance.

(3) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the supplier

whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

(4) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance and the existing service lines are equidistant from the service entrance, or it cannot be determined by proof which service line is nearest the new service entrance, then the consumer shall have the right of choice of supplier. No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations.

SECTION 18. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-333, Idaho Code, and to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. (1) Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the suppliers and designating which territories and consumers are to be served by which contracting supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are

being served by any or all of the contracting suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting supplier, or by reasonable and economic extensions thereto.

(2) Any electric supplier may also contract in writing with any other electric supplier for the sale, exchange, transfer or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section.

(3) Any contract validly entered pursuant to this section shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 19. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334, Idaho Code, and to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1) Grant Idaho public utilities commission jurisdiction over cooperatives or municipalities.

(2) Apply to controversies between two (2) or more public utilities.

(3) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of suppliers to serve new service entrances under section 61-332C, Idaho Code.

SECTION 20. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334A, Idaho Code, and to read as follows:

61-334A. LEGAL RELIEF FOR AGGRIEVED ELECTRIC CONSUMER. (1) Any consumer of electricity who feels aggrieved with his present electric service may apply to the district court of the county of his residence for an order to show cause why he should not be permitted to change supplier, and if the court finds and concludes that the electric service is inadequate and will not likely be made adequate or that the rates are unreasonable and will not likely be made reasonable, the court may authorize the change to the new supplier.

(2) The present and prospective electric supplier shall both be made a party to any suit under this section.

(3) This section and any order hereunder shall not be construed to grant any franchise or right to a public utility or cooperative to commence electric service within a municipality where it does not already have such franchise or right.

SECTION 21. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. LEGAL REMEDIES FOR VIOLATION OF THIS ACT. (1) Any electric supplier whose rights under this act shall be violated or threatened with violation, shall be entitled to injunctive relief against said violation upon proper complaint and proof in accordance with Idaho rules of civil procedure in district court, against the other

electric supplier and any other person responsible for the violation.

(2) In any suit for injunctive relief findings and conclusions by the court that any rules under this act have been violated or threatened to be violated shall require findings and conclusions by the court of actual or threatened irreparable injury as to the electric supplier whose rights are violated or threatened with violation as a basis for equitable relief hereunder.

(3) The injunctive relief to be granted under this section for violation of this act shall be negative in form, enjoining further acts in violation of such rules, shall be affirmative in form in requiring removal of any electric connections, facilities or equipment that constitute the violation and shall be a combination thereof necessary to enforce compliance with this act.

(4) Any aggrieved party may also pursue any other remedy provided by law.

SECTION 22. An emergency existing therefor, which emergency is hereby declared to exist, Sections 1 through 12 of this act shall be in full force and effect on and after its passage and approval; Section 1 of this act shall be null, void and of no force and effect on and after March 1, 2001; and Sections 13 through 21 of this act shall be in full force and effect on and after March 1, 2001.

APPENDIX C

|||| LEGISLATURE OF THE STATE OF IDAHO ||||
Fifty-sixth Legislature First Regular Session – 2001

IN THE HOUSE OF REPRESENTATIVES
HOUSE BILL NO. 42
BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO THE ELECTRIC SUPPLIER STABILIZATION ACT; REPEALING CHAPTER 1, LAWS OF THE FIRST EXTRAORDINARY SESSION OF 2000; TO PROVIDE A STATEMENT OF INTENT; AMENDING SECTION 61-332, IDAHO CODE, TO CLARIFY THE PURPOSES OF THE ELECTRIC SUPPLIER STABILIZATION ACT AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332A, IDAHO CODE, TO REVISE DEFINITIONS, TO DELETE A REFERENCE TO OBSOLETE MATERIAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332B, IDAHO CODE, TO REQUIRE APPROVAL OF THE PUBLIC UTILITIES COMMISSION FOR TRANSFERRING CONSUMERS; AMENDING SECTION 61-332C, IDAHO CODE, TO PROVIDE PROVISIONS FOR SELECTING AN ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332D, IDAHO CODE, TO SUPERVISE WHEELING SERVICES; AMENDING SECTION 61-333, IDAHO CODE, TO REQUIRE ELECTRIC SERVICE TERRITORY CONTRACTS TO BE FILED WITH AND APPROVED BY THE PUBLIC UTILITIES COMMISSION TO PROVIDE FOR NOTICE AND HEARING REGARDING CONTRACT APPROVAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-334, IDAHO CODE, TO PROVIDE THAT THE PUBLIC

UTILITIES COMMISSION HAS CERTAIN AUTHORITY OVER ELECTRIC SUPPLIERS, TO PROVIDE FOR APPLICATION OF PUBLIC UTILITIES LAW AND TO MAKE TECHNICAL CORRECTIONS; REPEALING SECTION 61-334A, IDAHO CODE; AMENDING SECTION 61-334B, IDAHO CODE, TO REDESIGNATE THE SECTION, TO PROVIDE FOR FILING A COMPLAINT WITH THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARINGS, TO PROVIDE REMEDIES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE COMMISSION SUPERVISION AND AUTHORITY; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334C, IDAHO CODE, TO PROVIDE ELECTRIC SUPPLIER IMMUNITY; AMENDING SECTION 30-3-14, IDAHO CODE, TO PROVIDE THAT ANY MEMBER OF A COOPERATIVE ASSOCIATION THAT PROVIDES ELECTRIC SERVICE MAY APPLY TO THE DISTRICT COURT OF THE COUNTY WHERE THE MEMBER'S SERVICE ENTRANCE IS LOCATED FOR A DETERMINATION THAT THE COOPERATIVE ASSOCIATION'S CHARGES FOR ELECTRIC SERVICE TO THAT MEMBER ARE FAIR, JUST AND REASONABLE AND ARE NOT DISCRIMINATORY OR PREFERENTIAL AND TO PROVIDE CIRCUMSTANCES WHEN THE COURT WILL REMAND THE MATTER TO THE COOPERATIVE ASSOCIATION; AMENDING SECTION 50-325, IDAHO CODE, TO PROVIDE THAT ANY CONSUMER OF A MUNICIPAL ELECTRIC SYSTEM MAY APPLY TO THE DISTRICT COURT OF THE COUNTY WHERE THE CONSUMER'S SERVICE ENTRANCE IS LOCATED FOR A DETERMINATION THAT THE MUNICIPALITY'S CHARGES FOR ELECTRIC SERVICE TO THAT CONSUMER ARE FAIR,

JUST AND REASONABLE AND NOT DISCRIMINATORY OR PREFERENTIAL, TO PROVIDE CIRCUMSTANCES WHEN THE COURT WILL REMAND THE MATTER TO THE MUNICIPALITY AND TO MAKE A TECHNICAL CORRECTION; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 1, Laws of the First Extraordinary Session of 2000, be, and the same is hereby repealed.

SECTION 2. LEGISLATIVE INTENT. The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal antitrust immunity upon parties in compliance with the act. The legislature fines that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.

It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore find that it is in the public interest to enact the following amendments.

It is the intent of the legislature in enacting Sections 14 and 15 of this act that relevant court precedent in existence on the effective date of this act be applicable in the interpretation of Sections 30-3-14 and 50-325, Idaho Code. Such court precedent shall include, but not be limited to, Kiefer v. City of Idaho Falls, 49 Idaho 458 (1930).

SECTION 3. That Section 61-332, Idaho Code, be, and the same is hereby amended to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. ~~A.~~ **(1)** This act includes sections 61-332, ~~*61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A, and*~~ **through** 61-334~~*B*~~**C,** Idaho Code, ~~*as herein enacted, section 61-333A, Idaho Code, as herein amended, and sections 61-333B and 61-333C, Idaho Code, as already enacted*~~, and shall be referred to herein as "this act" and may be cited and referred to as the "~~*e*~~**E**lectric ~~*s*~~**S**upplier ~~*s*~~**S**tabilization ~~*a*~~**A**ct."

~~*B.*~~ **(2)** This act ~~*is*~~ **and its amendments are** designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of ~~*customers*~~ **consumers** of another **electric** supplier, discourage duplication of electric facilities, **actively supervise certain conduct of electric suppliers as it relates to this act,** and stabilize the territories and ~~*customers*~~ **consumers** served with electricity by such **electric** suppliers.

SECTION 4. That Section 61-332A, Idaho Code, be, and the same is hereby amended to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1.) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2.) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3.) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to ~~*its citizens*~~ **the consumers of the municipality** in the state of Idaho.

(4.) "**Electric s**Supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5.) "Electric service" means electricity furnished to an ultimate consumer by a**n electric** supplier.

(6.) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7.) "Service entrance" means the ~~*entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment or utilization equipment" as defined in the national electrical code of 1965*~~ **location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists,**

and which are intended to provide the means of cutoff of the supply.

(8.) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the ~~*rules*~~ **provisions** of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9.) "Transmission line," **for the purposes of this act,** means any electric line of a**n electric** supplier ~~*for*~~ carrying a voltage of sixty-nine (69) KV or more.

(10.) "Service line," **for the purposes of this act,** means any **single or multi-phase** electric line of a**n electric** supplier **used** for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11.) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that **electric** supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

SECTION 5. That Section 61-332B, Idaho Code, be, and the same is hereby amended to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER **ELECTRIC** SUPPLIER. No electric supplier shall ~~*construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service nor shall it*~~ supply or furnish electric service to any electric service entrance that is then or had at any time previously been **lawfully** connected for electric service to facilities of another electric supplier, ~~*without the written consent of such other electric supplier; provided, however, (a) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance, and (b) such other electric supplier is willing and able to provide adequate electric service*~~ **except as provided in this act.**

SECTION 6. That Section 61-332C, Idaho Code, be, and the same is hereby amended to read as follows:

61-332C. ~~*RULES*~~ **PROVISIONS** FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. **(1)** In ~~*the event more than one electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall*~~ **determining which electric supplier will provide electric service for a new service entrance, the following provisions will** govern:

~~1.~~**(a)** If no electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of ~~the~~ **a** new service entrance the consumer shall have the right of choice of **electric** supplier.

~~2.~~**(b)** If only one (1) electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance that **electric** supplier shall have the right to serve the consumer at the new service entrance.

~~3.~~**(c)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance the **electric** supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

~~4.~~**(d)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance ~~and the existing service lines are equidistant from the service entrance, or~~ **and** it cannot be determined by proof which service line is nearest the new service entrance, then the consumer ~~shall have the right of choice of supplier~~ **or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.**

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the board of professional

engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the ~~*rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations*~~ **provisions of this section, except as ordered by the commission pursuant to this act.**

SECTION 7. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION** to be known and designated as Section 61-332D, Idaho Code, and to read as follows:

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric suppliers action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

SECTION 8. That Section 61-333, Idaho Code, be, and the same is hereby amended to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. ~~A.~~**(1)** Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the **electric** suppliers and designating which territories and consumers are to be served by which contracting **electric** supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting **electric** suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting **electric** supplier, or by reasonable and economic extensions thereto. **All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.**

~~B.~~**(2)** Any electric supplier may also contract in writing with any other electric supplier for the sale,

exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection ~~*A hereof. C. Any*~~ **(1) of this section and any** contract validly entered ~~*pursuant to this section*~~ **into and approved by the commission after notice and opportunity for hearing** shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 9. That Section 61-334, Idaho Code, be, and the same is hereby amended to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1.) Grant ~~*Idaho public utilities*~~ **the** commission jurisdiction over cooperatives or municipalities **except as authorized in this act.**

(2.) Apply to controversies between two (2) or more public utilities.

(3.) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of **electric** suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4.) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

SECTION 10. That Section 61-334A, Idaho Code, be, and the same is hereby repealed.

SECTION 11. That Section 61-334B, Idaho Code, be, and the same is hereby amended to read as follows:

61-334~~B~~**A**. ~~*LEGAL*~~ REMEDIES FOR VIOLATION OF THIS ACT. ~~*A.*~~**(1)** Any electric supplier **or consumer** whose rights under this act shall be violated or threatened with violation, ~~*shall be entitled to injunctive relief against said violation upon proper*~~ **may file a** complaint ~~*and proof in accordance with Idaho rules of civil procedure in district court, against the other*~~ **with the commission against an** electric supplier and any other person responsible for the violation.

~~*B.*~~**(2)** ~~*In any suit for injunctive relief*~~ **After notice and opportunity for hearing, the commission shall make** findings **of fact** and conclusions ~~*by the court that any rules under*~~ **of law determining whether** this act **or any orders issued under this act** have been violated or threatened to be violated **and** shall ~~*require findings and conclusions by the court of*~~ **determine whether there is** actual or threatened irreparable injury as to the electric supplier **or consumer** whose rights are violated or threatened with violation as a basis for ~~*equitable relief hereunder*~~ **granting relief.**

~~*C.*~~**(3)** The ~~*injunctive*~~ relief to be granted under this section for violation of this act shall ~~*be negative in form, enjoining*~~ **forbid** further acts in violation of such ~~*rules*~~ **orders**, shall ~~*be affirmative in form in requiring*~~ **order the** removal of any electric connections, facilities or equipment that constitute the violation, ~~*and shall be*~~ **or** a combination thereof necessary to enforce compliance with this act.

~~*D. Any aggrieved party may also pursue any other remedy provided by law.*~~

SECTION 12. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

SECTION 13. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334C, Idaho Code, and to read as follows:

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48, Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions of this act or any commission order issued pursuant to this act.

SECTION 14. That Section 30-3-14, Idaho Code, be, and the same is hereby amended to read as follows:

30-3-14. JUDICIAL RELIEF. (1) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws or this act, then upon petition of a director, officer, delegate, or member, the district court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and this act, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section the court may determine who the members or directors are.

(3) The order issued pursuant to this section may dispense with any requirements relating to the holding of or voting at meetings or obtaining votes, including

any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws or this act.

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section; provided however, that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws and this act.

(6) Any member of a cooperative association that provides electric service may apply to the district court of the county where the member's service entrance is located for a determination that the cooperative association's charges for electric service to that member are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or its discriminatory or preferential, the court shall remand the matter to the cooperative association

to alter or amend the rate in conformance with the standards set forth herein.

SECTION 15. That Section 50-325, Idaho Code, be, and the same is hereby amended to read as follows:

50-325. POWER PLANTS – POWER DISTRIBUTION. **(1)** Cities shall have authority: to acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city, and to sell excess power subject to the provisions of section 50-327**, Idaho Code.**

(2) Any consumer of a municipal electric system may apply to the district court of the county where the consumer's service entrance is located for a determination that the municipality's charges for electric service to that consumer are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or is discriminatory or preferential, the court shall remand the matter to the municipality to alter or amend such rate in conformance with the determination of the court.

SECTION 16. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.